No. 95-789

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS and COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC. and MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS, JOINED BY THE NATIONAL ASSOCIATION OF STATE AND TERRITORIAL APPRENTICESHIP DIRECTORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Congress, in enacting the Employee Retirement Income Security Act of 1974, intended to preempt state prevailing wage laws limiting payment of a lower apprentice wage on public projects to apprentices registered in programs approved as meeting federal standards.

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INTEREST OF THE *AMICI CURIAE*

Amici Council of State Governments, National Conference of State Legislatures, National Governors' Association, National Association of Counties, International City/County Management Association, National League of Cities, and U.S. Conference of Mayors are organizations whose members include state, county, and municipal governments and officials throughout the United States, and which have a compelling interest in legal issues that affect state and local governments. These *amici* have a longstanding interest in ensuring the development of proper principles of ERISA preemption to avoid encroachment on the authority of the States in a manner contrary to Congress' intent.

Amicus National Association of State & Territorial Apprenticeship Directors is comprised of the heads of state agencies responsible for administering state and federal laws and regulations to register and monitor quality apprenticeship programs.

States have a longstanding interest both in establishing wage rates on public projects and in protecting apprentices from exploitation. Thirty-two States have prevailing wage laws, and twenty-eight of those States restrict apprentice wages to registered apprentices. Pet. 8 n.2.

The court of appeals' decision threatens these important interests by adopting an overly expansive view of the scope of ERISA preemption. The decision ignores this Court's approach to ERISA preemption, articulated in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671, 1677 (1995), which requires looking beyond the text of the preemption

clause "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." If left uncorrected, the court of appeals' decision will seriously constrain States in their efforts to protect workers on public projects and to foster and encourage quality apprenticeship training pursuant to the Fitzgerald Act, 29 U.S.C. § 50. Yet here, as in *Travelers*, "there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." 115 S.Ct. at 1681.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

This case arose out of California's efforts to enforce its prevailing wage law, which requires that workers on public projects be paid the prevailing wage for their labor. *See* Pet. 4 (citing Cal. Lab. Code § 1771). California's prevailing wage law contains an exception allowing apprentices to be paid a lower-than-prevailing wage. Cal. Lab. Code § 1777.5. California's law further specifies that in order to qualify as an "apprentice" eligible for the lower apprentice wage, an employee must be registered with an approved apprenticeship program. *Id.*[2] Any

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

[2] Approval of apprenticeship programs must be granted by the California Apprenticeship Council, a state apprenticeship council recognized by the federal Bureau of Apprenticeship and Training "as the appropriate body for State registration and/or approval of local apprenticeship programs and agree-

worker who is not registered in such a program does not qualify for "apprentice" wages, and must be paid the ordinary prevailing wage. *See* Pet. App. 4.

In the course of performing work on a public project, Sound Systems Media, a subcontractor of Dillingham Construction, N.A., Inc., employed workers who did not qualify as "apprentices" for wage purposes under California's prevailing wage law because the program in which they were registered had not received state approval. Accordingly, the law required that they be paid the ordinary prevailing wage. *See* Pet. App. 51. Because Sound Systems failed to pay the ordinary prevailing wage to these workers, a "Notice to Withhold" was issued against Dillingham by the State. Pet. 4.

The present case arises out of this wage dispute. California's law is challenged only as applied to Sound Systems' employees, who were ineligible under the law to receive apprentice wages. *See* Opp. 5. Sound Systems' workers did not qualify as apprentices under the wage law because the apprentice training program in which they were enrolled had not been granted state approval during the period in question.

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ments for Federal purposes." 29 C.F.R. § 29.2(o); *see* Pet. 3. The federal standards set forth in 29 C.F.R. Part 29, the regulations promulgated pursuant to the Fitzgerald Act, must be met in order for an apprenticeship program to receive approval from the state apprenticeship council. *See* 29 C.F.R. § 29.1(b). No question is presented here regarding state apprenticeship standards that are independent of the federal standards. *See* Reply to Br. in Opp. at 2.

SUMMARY OF ARGUMENT

1. California's law does not "relate to" an "employee benefit plan" within the meaning of ERISA, 29 U.S.C. § 1144(a), and thus is not preempted. The regulation of wage and apprenticeship practices is a traditional exercise of state authority which is presumptively not preempted. "[W]here federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671, 1676 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Consistent with this presumption, state regulation of ordinary payroll practices falls outside the scope of ERISA's preemption clause. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107 (1989); *see* 29 C.F.R. § 2510.3-1(b). Because California's law involves just such a routine payroll practice and "neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under [the] federal statute," it is not preempted. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 6 (1987). Moreover, preemption here would not serve the primary purpose of ERISA preemption—the "eliminat[ion of] the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Travelers*, 115 S.Ct. at 1677-78 (citations omitted).

2. Even if California's law were found to fall within the scope of ERISA's preemption clause, it would nevertheless be saved from preemption by

ERISA's savings clause, which states that ERISA should not be interpreted "to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d). The Fitzgerald Act, 29 U.S.C. § 50, enacted 37 years prior to ERISA, provides for cooperative federal and state roles in promoting quality apprenticeship programs. It expressly directs the Secretary of Labor "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship." *Id.* The legislative history of the Fitzgerald Act and the regulations promulgated pursuant to it reinforce the active role of the States in regulating apprenticeship. To find state efforts regarding apprenticeship preempted would render "utterly nugatory" a significant component of the Fitzgerald Act, and would leave the "States without the authority to do just what Congress was expressly trying to induce them to do." *Travelers*, 115 S.Ct. at 1682.

3. Preemption of laws such as California's would have serious negative consequences that are inconsistent with congressional intent. Unless a State can set some standards for the payment of apprenticeship wages, employers will label employees "apprentices" to avoid paying them the prevailing wage but will provide little or no meaningful training. To prevent this practice from eviscerating the prevailing wage law, States will be forced to eliminate the apprentice wage as an option—and with it, all bona fide apprenticeship training programs on public works projects. This result runs directly counter to the States' historic role in regulating apprenticeship and the purposes of the Fitzgerald Act. Such an outcome is insupportable where, as here, "there is

not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." *Travelers*, 115 S.Ct. at 1681.

ARGUMENT

I. CALIFORNIA'S LAW IS NOT PREEMPTED BY ERISA

ERISA's preemption clause covers "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a). The first step in determining whether California's law is preempted by ERISA is to determine whether it falls within the scope of this preemption language —in other words, whether California's requirement that apprentice wages be paid only to apprentices registered in approved programs "relate[s] to" an "employee benefit plan" within the meaning of ERISA. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97-98 (1983). As *amici* discuss below, California's law does not have such a connection with or reference to an employee benefit plan.

Moreover, as this Court explained in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S.Ct. 1671, 1677 (1995), the words of the preemption clause cannot be meaningfully analyzed in a vacuum; a court must "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." When the objectives of the ERISA statute are considered, it becomes even

more clear that Congress did not intend to preempt California's apprenticeship wage laws.

A. Setting Standards for Payment of Apprenticeship Wages on Public Projects Is a Traditional Exercise of State Authority That Is Presumptively Outside the Scope of ERISA Preemption

In an ERISA preemption case, as in any other preemption case, analysis begins with the presumption that traditional exercises of state authority are not preempted. "ERISA pre-emption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.'" *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981)). As the Court recently elaborated in *Travelers*:

> [W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

115 S.Ct. at 1676 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (other citations omitted). *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) ("We also must presume that Congress did not intend to pre-empt areas of traditional state regulation.")

(citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

As this Court has repeatedly recognized, wage practices are a traditional area of state authority giving rise to the presumption against preemption. "The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.'" *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989) (quoting *Fort Halifax*, 482 U.S. at 19).[3]

Legislation relating to apprenticeship is a classic exercise of state authority. States have been regulating apprenticeship since the late eighteenth century. W.J. Rorabaugh, *The Craft Apprentice: From Franklin to the Machine Era in America* 51 (1986).[4] In the late 1840's, when "the practice of competitive bidding had spread to state governments," the spe-

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[3] *See also De Canas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.").

[4] *See also* Paul H. Douglas, *American Apprenticeship and Industrial Education* 20, 41-52 (1921) (discussing state and local regulation of apprenticeship in colonial times and its link with the related state function of public education); *id.* at 66-69 (state legislation in the 1870's); *id.* at 78-79 (discussing Wisconsin's apprenticeship statute of 1911, administered by a state apprenticeship board and setting standards for working hours and wage rates).

cific problem of employers winning contracts by hiring "apprentices" (who were paid low wages but provided little or no training) emerged. *See id.* at 152. As early as the 1870's, state legislatures began setting apprenticeship training standards to combat the exploitation of apprentices as a source of cheap labor. For example, New York passed an apprenticeship law in 1871 which contained the requirement that "the employer must teach or have the apprentice taught 'every branch of his or their business.'" Douglas, *American Apprenticeship* at 67 (citing Laws of New York, 94th Session, vol. ii, pp. 2147-50, ch. 934). Prevailing wage laws like California's, which place limits on the payment of apprentice wage rates on public projects, are now both widespread and longstanding. *See, e.g.*, Pet. 8 n.2 (Twenty-eight States' prevailing wage laws limit apprentice wages to apprentices in approved programs); *id.* at 6 (California's lower wage rate for apprentices on public projects established 39 years prior to enactment of ERISA).

California's law limiting the payment of apprentice wage rates on public projects is plainly a traditional exercise of state authority. Under this Court's precedents, it is not subject to preemption "'unless that was the clear and manifest purpose of Congress.'" *Travelers*, 115 S.Ct. at 1676 (quoting *Rice*, 331 U.S. at 230). As discussed below, there is no indication that Congress intended to preempt the classic exercise of state regulatory authority at issue in this case.

B. California's Law Relates to a Payroll Practice, Not to an Employee Benefit Plan

ERISA's preemption clause covers, with certain exceptions,[8] "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a). Although the Court has at times remarked on the breadth of this preemption language, *see, e.g., Shaw v. Delta Airlines*, 463 U.S. 85, 96 (1983), it has also consistently recognized its limits. *See id.* at 100 n.21; *Travelers*, 115 S.Ct. at 1677. In defining the boundaries of the preemption clause, the Court has looked to the underlying purpose of the preemption provision—"eliminat[ing] the threat of conflicting or inconsistent State and local regulation of employee benefit plans" that might create administrative burdens for employers. *Travelers*, 115 S.Ct. 1677-78 (citations omitted).

Specifically recognized as falling outside the scope of ERISA preemption are traditional state wage laws of general applicability that relate only to payroll practices and do not implicate any of the administrative burdens associated with an employee welfare benefit plan. In *Massachusetts v. Morash*, 490 U.S. 107 (1989), the Court held that a Massachusetts law requiring that employers pay workers holiday and vacation payments upon discharge related only to such a "payroll practice," and not to an "employee benefit plan" under ERISA. Likewise, the Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), upheld against an ERISA preemption challenge a Maine law requiring employers to pay

[8] One such exception, ERISA's savings clause, is directly applicable to this case and is discussed in Part II, *infra*.

workers a one-time severance payment in the event of a plant closing "because the statute neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' under [the] federal statute." *Id.* at 6. Similarly, the law challenged here does not establish or require an employer to maintain an employee welfare benefit plan.[6] It merely sets the wages that must be paid to various categories of employees, including apprentices, and, as a necessary adjunct of doing so, sets the criteria by which workers are classified.

The Court has emphasized that a law may relate to a type of *benefit* listed in ERISA without relating to an employee benefit *plan* within the meaning of ERISA's preemption provision. In *Fort Halifax*, the Court stressed the importance of this distinction:

> Appellant's basic argument is that any state law pertaining to a type of employee benefit listed in ERISA necessarily regulates an employee benefit plan and therefore must be pre-empted. . . . In effect, appellant argues that ERISA forecloses virtually all state legislation regarding employee benefits. This contention fails, however, in light of the plain language of ERISA's pre-emption provision, the underlying purpose of that provision, and the overall objectives of ERISA itself.

Id. at 7; *see also id.* at 7-8 ("ERISA's pre-emption provision does not refer to state laws relating to 'em-

[6] California law regarding apprentices is complex and contains a number of requirements that are not at issue here. *See generally* Cal. Lab. Code § 1777.5; Pet. App. 2-4. However, the only aspect of California law presently before the Court is the rule that employees working on public projects not be paid apprentice wages unless they are registered in approved apprenticeship programs.

ployee benefits,' but to state laws relating to 'employee benefit *plans*' ") (quoting 29 U.S.C. § 1144 (a)); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990) ("under the plain language of § 514(a) the Court has held that only state laws that relate to benefit *plans* are pre-empted").

As the *Fort Halifax* Court explained,

> The words 'benefit' and 'plan' are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic difference between a 'benefit' and a 'plan,' Congress' choice of language is significant in its pre-emption of only the latter.

482 U.S. at 8. Thus, even if California's law "relates to" an "apprenticeship or other training program" (a type of benefit listed in ERISA, *see* 29 U.S.C. § 1002(1)(A)), this is not determinative. Instead, the relevant question is whether the law in question relates to a *plan* established and maintained by the employer to provide this type of benefit. Here, California's law relates only to the level of compensation to be provided employees who are receiving apprenticeship training—a payroll practice outside the scope of ERISA preemption.

Indeed, all "payroll practices," such as payment for work performed, payment at a rate in excess of the normal rate of compensation, and payment for periods in which no work was performed, have been expressly excluded by regulation from ERISA's definition of an "employee welfare benefit plan." *See* 29 C.F.R. § 2510.3-1(b). Of direct relevance to this case, "[p]ayment of compensation on account of periods of time during which an employee performs

little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds)" is among the "payroll practices" listed in the regulation as excluded from the term "employee welfare benefit plan." 29 C.F.R. § 2510.3-1(b)(3)(iv).[7]

The provision of California law at issue here dictates nothing more than the wage rate which must be paid to different categories of employees, including apprentices who are undergoing training. As such, it relates only to an employer's payroll practices, and not to an "employee benefit plan" within the meaning of ERISA's preemption clause. It does not require "establishment or maintenance of an ongoing plan" within the meaning of ERISA, nor does it place any onerous administrative burdens on employers. At most, it affects employers' incentives by encouraging the hiring of apprentices in approved training programs. As discussed below, such indirect economic effects do not trigger ERISA preemption.[8]

C. Any Connection Between California's Law and an Employee Benefit Plan Is Too Tenuous and Remote to Trigger Preemption

The Court has also placed limits on the scope of the words "relate to" in ERISA's preemption clause, noting that " '[p]reemption does not occur . . . if the

[7] This regulatory refinement of the definitions contained in ERISA by the agency charged with administering the statute is plainly reasonable and entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

[8] Moreover, any economic incentive that encourages employers to hire and train apprentices is in direct furtherance of the goals of the federal Fitzgerald Act. *See* Part II, *infra*.

state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.' " *Travelers*, 115 S.Ct. at 1680 (quoting *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992)); *see also Shaw*, 463 U.S. at 100 n.21. For example, the Court has been unwilling to find preempted state laws which have only an incidental or indirect economic impact on ERISA plans. *See Travelers*, 115 S.Ct. at 1679 (indirect impact on economic incentives does not result in ERISA preemption).

Thus, the fact that a state law may have some conceivable connection with a covered plan is not sufficient to establish ERISA preemption. The prevailing wage provision at issue here does not directly regulate training programs, nor does it single out ERISA plans.[9] Rather, it is "a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990). Any conceivable connection to ERISA plans operates only incidentally, and at the remote and tenuous level of economic incentives. As this Court has made clear, however, a remote impact of this nature is too attenuated to result in ERISA preemption.

In *Travelers*, the Court similarly acknowledged the possibility that hospital surcharges might make par-

[9] The provision at issue here does not mandate that an employer hire apprentices, nor does it impose sanctions on apprentice training programs that fail to meet the standards for state approval. The only consequence of a program's failure to receive state approval is that employees enrolled in such a non-approved program must be paid the ordinary prevailing wage.

ticular insurance providers "more attractive (or less unattractive) as insurance alteratives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." 115 S.Ct. at 1679. The Court held, however, that such "[a]n indirect economic influence, . . . [which] does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself," was insufficient to trigger preemption. *Id.*

Of course, any type of wage or employment legislation may have an impact on employers' costs. "Even basic regulation of employment conditions will invariably affect the cost and price of services." *Travelers*, 115 S.Ct. at 1679; *see Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975, 979 (8th Cir. 1995) ("[a]ny wage regulation has the potential to increase costs to the employer"). Yet the Court in *Travelers* held that to find all such "common state action with indirect economic effects on a plan's costs" preempted would

> effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that "preemption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability."

115 S.Ct. at 1679-80 (citations omitted).

Moreover, the Court in *Travelers* recognized that the phrase "relate to" is, on its own, an inadequate guide to ERISA's preemptive scope, since " '[r]eally, universally, relations stop nowhere.' " 115 S.Ct. at 1677 (citation omitted). In order to give effect to

Congress' limiting language, it is necessary to "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* When the objectives of ERISA are considered, it becomes even clearer that state wage laws such as California's were not within the intended scope of ERISA preemption.

ERISA was enacted "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits" by imposing reporting and disclosure obligations on employers administering such plans. *Morash*, 490 U.S. at 112-13; *Fort Halifax*, 482 U.S. at 15. As the Court has noted, "Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Morash*, 490 U.S. at 115. Thus, the statutory scheme is directed at separately funded "plans" in which benefits "accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee," not at the payment of wages out of an employer's general assets. *Id.* at 116.

Further, as the Court observed in *Shaw*, the primary purpose of ERISA's preemption clause was to "eliminat[e] the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams) (quoted in *Shaw*, 463 U.S. at 99); *see Ingersoll-Rand Co.*, 498 U.S. at 142. Where a state law does not introduce any administrative burdens relating to the maintenance of an ongoing plan, preemption would not serve Congress' purpose. The aspect

of California law at issue here relates only to the wages which an employer must pay out of its general assets; it does not require creation of a plan or impose any administrative burdens on an ERISA plan.

II. CALIFORNIA'S LAW IS SAVED FROM ERISA PREEMPTION BY THE FITZGERALD ACT, PURSUANT TO ERISA'S SAVINGS CLAUSE

Even if California's law were found to fall within the scope of ERISA's preemption clause, it would nevertheless be saved from preemption by section 514(d), 29 U.S.C. § 1144(d). Section 514(d) provides: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."

The Fitzgerald Act, which predates ERISA by 37 years, was adopted to foster and promote quality apprenticeship programs. It expressly directs the Secretary of Labor to "cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship." 29 U.S.C. § 50. The Act, its legislative history, and the regulations promulgated pursuant to it, plainly contemplate that States will take a leading and active role in promoting apprenticeship and setting apprenticeship standards. States had a long history of regulating apprenticeship prior to the Fitzgerald Act, *see* pp. 9-10, *supra*, and the Act was designed to support and coordinate those efforts rather than displace them.

The legislative history of the Fitzgerald Act establishes that States were expected to continue taking primary responsibility for apprenticeship conditions and standards, and were viewed as uniquely well-suited to do so:

> It has been amply demonstrated that the responsibilities in connection with the apprentice as an employed worker can best be carried on by the State labor department which is charged with the general responsibility of improving working conditions and fostering the well-being of the workers, and that the responsibilities in connection with the apprentice as a student can best be performed by the State board for vocational education. These State agencies in turn look to the United States Department of Labor and to the United States Office of Education for leadership and research and for the determination of national standards in their respective fields.

House Comm. on Labor, *Safeguard the Welfare of Apprentices*, H.R. Rep. No. 945, 75th Cong., 1st Sess. 5 (1937) (Memorandum of Secretary of Labor). *See also* U.S. Department of Labor, Bureau of Apprenticeship, *Apprenticeship, Past and Present* 20 (1950) (discussing state involvement in setting up apprenticeship programs pursuant to the Fitzgerald Act).

Moreover, the regulations issued by the Department of Labor reinforce the active state role contemplated by the Fitzgerald Act. *See generally* 29 C.F.R. Part 29. The power of the State to prescribe minimum wages for apprentices is specifically set forth in 29 C.F.R. § 29.5(5): "The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement."

The leading role of the States in apprenticeship is also apparent when funding is considered. According to a GAO study, "[i]n 1990, states spent roughly

three times the level of federal spending to support apprenticeship." U.S. General Accounting Office, *Apprenticeship Training: Administration, Use, and Equal Opportunity* 4 (GAO/HRD-92-43) (March 1992). *See also id.* at 18 ("Since 1980, federal appropriations for apprenticeship services have declined by about 30 percent in 1990 dollars."). In addition, given their historic role in education, *see, e.g., United States v. Lopez*, 115 S.Ct. 1624, 1632 (1995), the States are in the best position to develop and promote apprenticeship programs for young people entering the workforce. *See generally* U.S. General Accounting Office, *Transition From School to Work: States are Developing New Strategies to Prepare Students for Jobs* (GAO/HRD-93-139) (September 1993); U.S. General Accounting Office, *Training Strategies: Preparing Noncollege Youth for Employment in the U.S. and Foreign Countries* (GAO/HRD-90-88) (May 1990).

To find that all state apprenticeship standards are preempted by ERISA would obviously preclude this state role, and would, at the very least, "alter," "amend" and "modify" the Fitzgerald Act (and the regulations promulgated thereunder) to make all references to state participation a nullity. Under the reasoning in *Shaw v. Delta Airlines*, the States' role in enforcing federal standards in a scheme of cooperative federalism must be preserved from ERISA preemption under the savings clause. *See* 463 U.S. at 102-03.[10] As was the case with the National Health

[10] This case does not involve state apprenticeship standards which are different than the federal standards set forth in regulations promulgated pursuant to the Fitzgerald Act. *See* Reply to Br. in Opp. at 2.

Planning & Resources Development Act of 1974[11] discussed in *Travelers* (in which the federal government was to encourage States to engage in health planning and rate regulation), to find state efforts preempted here would likewise render "utterly nugatory" a part of a federal statute "since it would [leave] the States without the authority to do just what Congress was expressly trying to induce them to do." *Travelers*, 115 S.Ct. at 1682.

III. THE PREEMPTION OF STATE APPRENTICESHIP LAWS WOULD HAVE SERIOUS NEGATIVE CONSEQUENCES

The case against preemption becomes even more clear when one considers the serious negative consequences that would result from preemption of state apprentice wage laws like California's. The approach adopted by the Court in *Travelers* requires consideration of precisely such practical consequences. *See Travelers*, 115 S.Ct. at 1681 (discussing "unsettling result" of finding state law preempted).

Preemption in this instance would have the profoundly "unsettling result" of forcing States, which have long been involved in regulating wage and apprenticeship practices, to effectively eliminate the option of apprenticeship training on public projects. *Cf. id.* As history has demonstrated, unless some standards are set for the payment of an apprentice wage, firms will cut costs by labeling as "apprentices" employees who are provided little or no useful training. *See, e.g.*, Bernard Elbaum and Nirvikar Singh, *The Economic Rationale of Apprenticeship*

[11] Pub. L. No. 93-641, 88 Stat. 2225, §§ 1-3 (repealed by Pub. L. No. 99-660, title VII, § 701(a), 100 Stat. 3799).

Training: Some Lessons from British and U.S. Experience, 34 Industrial Relations 593, 602 (Oct. 1995) ("[I]t is well documented that some firms exploited youths by hiring them for apprenticeships at relatively low wages while providing little or no training."). If a State is powerless to set any standards as to the circumstances under which a lower-than-prevailing apprentice wage may be paid, it must eliminate the apprentice wage as an option or risk complete evisceration of its prevailing wage law by employers who would label low-paid workers as "apprentices" without providing any training. *See* Pet. App. 51. And because bona fide apprentice training is costly to employers, *see, e.g.*, Douglas, *American Apprenticeship* at 81, quality apprenticeship training will be discouraged unless such a lower-than-prevailing wage is available.

Such an outcome cannot be squared with the presumption against preemption where, as here, "there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts." *Travelers*, 115 S.Ct. at 1681. Moreover, this result would run directly counter to the purposes of the Fitzgerald Act, and cannot be reconciled with ERISA's savings clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the Amici Curiae*

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